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No. 02-1192

In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

AVIALL SERVICES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO THE OPPOSITION TO THE PETITION

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Petitioner Cooper Industries, Inc. ("Cooper") respectfully submits this reply to the Brief in Opposition to Petition for a Writ of Certiorari ("Opp.") filed by Aviall Services, Inc. ("Aviall").

Aviall's Opposition oversimplifies the controversy and confusion surrounding the interpretation of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and understates the significance of the issue in dispute. The proper interpretation of CERCLA Section 113(f)(1)'s operative language has admittedly divided the *en banc* Fifth Circuit Court of Appeals, in addition to many judges on the other trial and appellate courts. *See* Petition for a Writ of Certiorari ("Pet.") 27. In addition, the opinion below completely disregarded the requested views of the federal government and dramatically altered the common law of contribution. The continuing divergent views among the

courts on this key aspect of CERCLA enforcement require guidance from this Court.

Aviall's oversimplification mainly consists of ignoring the important distinction between Section 107(a)(4)(B), 42 U.S.C. § 107(a)(4)(B), direct cost recovery claims and derivative claims for contribution under Section 113(f)(1). Instead of recognizing that two divergent lines of precedent create discrete rules applicable to each of these distinct claims, Aviall discusses these cases interchangeably. After reading the detailed discussion of these two lines of authority in Cooper's petition (Pet. 15-17 nn. 11-12), Aviall should know better.[1] The following discussion untangles Aviall's muddled analysis and ensures that the core issue for review has not been improperly obscured.

1. Aviall seeks contribution, not cost recovery.

Aviall only seeks contribution under Section 113(f)(1), not direct cost recovery under Section 107(a)(4)(B). In fact, Aviall voluntarily dropped the Section 107 claim from its original complaint.[2] App. 93a-94a. Thus,

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[1] The Fifth Circuit *en banc* majority made the same mistake, suggesting that *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982) was the "seminal decision" regarding "contribution" rights under CERCLA. App. 15a. To the contrary, "contribution" is not addressed (or even mentioned) anywhere in the *Stepan Chemical* decision or any of the other cases cited by the Fifth Circuit as supposedly being "in the nature of contribution." App. 16a, nn 6-7.

[2] Presumably Aviall dropped this claim because it knew that cost recovery under Section 107(a)(4)(B) was unavailable. Overwhelming precedent confirms that persons who, like Aviall, have contributed to contamination cannot pursue cost recovery claims under Section 107(a)(4)(B) of CERCLA. *See* Pet. 25 n. 22 and cases cited.

the cost recovery precedent relied on by Aviall (Opp. 8) is irrelevant and unhelpful. Cooper agrees that a party seeking Section 107(a)(4)(B) *cost recovery* for contamination caused solely by others can recover without first being subjected to clean-up liability. *See* Pet. 25 n. 22 and cases cited. However, that is not the issue in this case. Rather, Cooper asks this Court to determine whether persons seeking *contribution* under Section 113(f)(1) must first be subject to a civil action under CERCLA Section 106, 42 U.S.C. § 9606, or Section 107. *See* Pet. 2.

As the Fifth Circuit found (App. 10a), Aviall's cleanup was not in response to any federal or state enforcement action under Section 106 or 107 of CERCLA. Further, Aviall has never been subject to any private CERCLA claim – whether by Cooper or by any other party.[3] Thus, to characterize this case as "a garden variety CERCLA action" for contribution (Opp. 1) is misleading. Indeed, prior to enactment of Section 113(f)(1), CERCLA contribution claims were recognized only as implied rights of action in cost recovery suits under Section 107(a)(4)(B), where those subject to liability for clean-up costs in a Section 107 enforcement action sought to implead other potentially responsible parties to share those clean-up costs. *See* Pet. 6-7. As the legislative history of Section 113(f)(1) makes clear, this was the "garden variety CERCLA action" that Congress added to the statute as an express right of contribution -- tied by the "during or following" language (as the implied right of action had been) to a Section 106 or 107 "civil action." Pet. 15-17.

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[3] Aviall's allegation that "Cooper has not dropped its claim for cost-recovery under section 107(a)(4)(B)" of CERCLA (Opp. 1-2) is simply false. Cooper *never filed any such claim* in this case.

By reading Section 113(f)(1)'s savings clause as overriding its enabling language, Aviall attempts to argue that Cooper's interpretation departs from the common law of contribution. Opp. 7. To the contrary, it is the undue weight placed by the Fifth Circuit on the provision's savings clause that effectuates a change from the common law. As confirmed by a more careful reading of the very cases Aviall cites (Opp. 4), at common law only those held liable for costs incurred had a right of contribution against other responsible persons. *See* Pet. 18-21; *see also* RESTATEMENT (SECOND) OF TORTS § 886a, cmt. e (1979) (before there can be contribution there must be joint tortfeasors). Congress has opened the door no farther. *See* Pet. 14-17.

Aviall's argument that enforcing Section 113(f)(1)'s explicit "during or following" requirement would eliminate contribution rights long available to responsible parties who voluntarily cleaned up their property (Opp. 8-9, 9 n. 3) is disingenuous. In fact, contribution rights have *never* been available to parties who did not contribute to the contamination and incur liability. *See* RESTATEMENT (SECOND) OF TORTS § 886a, cmt. e (no contribution in favor of a volunteer); *see also* Pet. 20-21. Section 113(f)(1) maintains this *status quo*, explicitly providing no more under the enabling clause, and preserving no less under the savings clause.

In contrast, the Fifth Circuit's far more expansive interpretation opens a right of contribution to virtually all litigants – a result finding no support in the historic underpinnings of common law contribution. Equally disturbing, the Fifth Circuit's reliance on Section 113(f)(1)'s savings clause to override its enabling clause defies every known principle of statutory construction. *See* Pet. 12-14. Notably, Aviall offers no argument whatsoever justifying such a result.

2. This Court's guidance is required to resolve the pervasive disagreement on this important issue of statutory interpretation.

Contrary to Aviall's assertion (Opp. 5), the federal circuits are far from "uniform" in their interpretation of Section 113(f)(1). As more fully discussed in the Petition (*see* Pet. 26), the Fifth Circuit's holding -- that Section 113(f)(1) allows contribution suits in the absence of a pending or concluded enforcement action -- directly conflicts with the Seventh Circuit's analysis in *Rumpke v. Cummins Engine Co.*, 107 F. 3d 1235 (7th Cir. 1997), which concluded that a Section 106 or Section 107 civil action must "either be ongoing or already completed before § 113(f)(1) is available." *Id.* at 1241.

The First Circuit supports the Seventh Circuit's conclusion. In *In re Hemingway Transport Inc.*, 993 F.2d 915, 931 (1st Cir. 1993), the First Circuit reads Section 113(f)(1)'s savings clause as preserving a right of contribution for one who had incurred clean-up costs in response to a Section 106 EPA order. In contrast, under similar circumstances, both the Sixth and Tenth Circuits displayed seeming indifference to Section 113(f)(1)'s "during or following" limitation by allowing contribution actions to proceed. *Compare Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344 (6th Cir. 1998), and *Sun Co. v. Browning-Ferris, Inc.*, 124 F.3d 1187 (10th Cir. 1997).

The federal district courts are no more "uniform" in their view of when Section 113(f)(1) permits the filing of a CERCLA contribution action. As set forth in the Petition, a number of lower courts have found that a pending or concluded Section 106 or 107 enforcement action is unnecessary to seek CERCLA contribution. *See* Pet. 27 and

cited cases. In direct contradiction, other district courts have held that Section 113(f)(1)'s "during or following" clause explicitly limits CERCLA contribution rights. *See id.* and cases cited. This divergence signifies a deep and irreconcilable division that only this Court can resolve.[4]

Further, a grant of certiorari here is particularly important due to the breadth of Section 113(f)(1)'s impact. Interpretation of Section 113(f)(1) raises several other significant concerns, including its effect on the appropriate statute of limitations for contribution actions and the extent of federal preemption. *See* Pet. 21-25. These issues turn directly on whether the key facets of Section 113(f)(1) are read literally (as by the Seventh and First Circuits) or expansively (as by the *en banc* court below). Aviall mischaracterizes these considerations as "red herrings." Opp. 10. To the contrary, such concerns have a direct bearing on the present statutory question and underscore the need for this Court to resolve this issue and thereby avoid further widespread confusion.

Accordingly, Cooper urges that the writ be granted, and that the issue as to the proper interpretation of CERCLA Section 113(f)(1) be heard by the Court. The Fifth Circuit, ignoring the views of the United States, wrongly decided that Congress devised a "free standing" right of contribution, divorced from any underlying liability determination. This conclusion contradicts the common law. It does not comport

[4] Aviall suggests that the issue is not of sufficient moment for this Court to address because few of the district court cases have found their way to the courts of appeals. Opp. 3. The fact that a case does not advance to the appellate courts, for whatever reason, in no way detracts from the importance of the issue or minimizes the depth of controversy. Here especially, such an observation cannot hide the presence of a festering issue of statutory construction that divides the federal courts and causes confusion with respect to CERCLA enforcement.

with the language or history of the statutory provision in question. It flies in the face of the construction of Section 113(f)(1) that the government, as the statute's principal enforcer, has assigned to the provision. And, it directly conflicts with the decisions of other federal circuits and district courts. Plenary review is, therefore, needed.

CONCLUSION

For the reasons stated here and in its Petition for Certiorari, Cooper requests that this Court grant the writ and hear this case.

Respectfully submitted.

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